DATO' DR TAN CHEE KHUAN

v.

CHIN CHOONG SENG

HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-369-2003]
19 NOVEMBER 2010

TORT: *Defamation - Libel - Republication of libellous words by person defamed to rebut defamation - Whether absolved initial publication by defamer - Whether republication had effect on damages awarded by court - Failure of defendant to show which offending words were opinion and which were statements of fact - Non-compliance with O. 78 r. 3(2) Rules of the High Court 1980 - Whether defences of fair comment and justification made out - Defamation Act 1957, ss. 8 & 9*

The plaintiff, a consultant psychiatrist, art dealer, art writer, publisher and art gallery owner, brought an action for libel against the defendant, an artist and writer, in respect of two articles the defendant had written in a daily newspaper ('Sunday Sun') and in an art magazine ('Art Corridor'). The plaintiff was also a philanthropist, consultant to Christies International Singapore Pte Ltd for Malaysian Art, a past-president of the Bayan Baru Rotary Club, past-chairman of the Malaysian Medical Association, Penang branch, past-president of the Penang Medical Practitioners' Society and a member of the Board of Trustees in the Mental Health Association of Penang. He claimed that six statements in the two articles were defamatory of him. He said the statements suggested that he was, *inter alia*, self-centred, unethical, untrustworthy and irresponsible, an opportunist who was interested only in making money and hid his motive behind a veil of charity, unscrupulous in using his late wife's name to make profit, a liar and a cheat, a donor of artworks of inferior quality and one who conducted bad business practices.

It surfaced during the trial that when the defendant's first article about the plaintiff appeared in the Sunday Sun, the plaintiff repeated the defendant's article in his published book and rebutted what the defendant had said about him. The plaintiff also wrote a summary of the defendant's said article and his rebuttal in the Art Corridor and invited the defendant to reply to discuss and resolve the differences between them. It was upon that request that the defendant responded with the article in Art Corridor, which

A together with the Sunday Sun article, formed the basis of the libel suit. The defendant pleaded fair comment and justification for the remarks he had made.

Held (allowing the plaintiff's claim):

B **(1)** The words complained of, in their natural and ordinary meaning, were defamatory of the plaintiff and were caused to be published by the defendant. (paras 17 & 18)

(2) The fact that the plaintiff had subsequently, in his book, C republished the quoted defamatory words to explain, reply or rebut the said defamation did not absolve the initial publication by the defendant. The plaintiff's invitation to the defendant to respond to his article in the art magazine was cordial and there was no reason for the defendant to use defamatory D words to attack, accuse or condemn the plaintiff. (para 20)

(3) The defendant failed to comply with O. 78 r. 3(2) of the Rules of the High Court 1980 to show which of the offending words were expressions of opinion, for which he could claim E fair comment, and which of the words were statements of fact, which he had to prove to be true. This failure rendered the defence of fair comment unsustainable. (paras 28 & 29)

(4) The defendant's allegation of comment was not based on any F true facts. What he had expressed in the two publications were not fair and were malicious. Under the pretext of criticising the plaintiff, he took the opportunity of attacking the plaintiff's character and reputation, that whatever the plaintiff did was cloaked under profit-driven motives *inter alia*. This was G not fair comment but libellous. (para 30)

(5) There was no evidence from the defendant to prove the defamatory imputations of the plaintiff were true. The defendant did not attempt to find out, investigate or verify the truth of what he had imputed. On the contrary, his evidence H consisted of admissions of mere conjectures and untruths. The plea of justification therefore failed. (para 33)

(6) There was no clear evidence from the plaintiff to prove the criteria for aggravated and exemplary damages as envisaged by I the law. (para 40)

[Awarding RM150,000 in general damages with interest at 8% per annum from the date of judgment to date of realisation; disallowing claim for aggravated and exemplary damages.]

Case(s) referred to:

Campbell v. Spottiswoode [1863] 3 B & S 769 ***(refd)***
Capital And Counties Bank v. Henty [1882] 7 App Cas 741 ***(refd)***
Carr v. Hood [1808] 1 Camp 354 ***(refd)***
Ismail Shamsudin v. Abdul Aziz Abdan [2007] 8 CLJ 65 HC ***(refd)***
Kemsley v. Foot [1952] AC 345 HL ***(refd)***
Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC ***(refd)***
Macleod, MD v. Wakley [1828] 3 Car & P 311 ***(refd)***
Mark Ignatius Uttley v. Wong Kam Hor & Anor [2002] 8 CLJ 628 HC ***(refd)***
Mc Carey v. Associated Newspapers Ltd [1964] 3 All ER 947 ***(refd)***
Merivale v. Carson [1887] 20 QBD 275 ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [1995] 2 CLJ 912 CA ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Rubber Improvement Ltd v. Daily Telegraph Ltd [1964] AC 234 ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Sim v. Stretch [1936] 2 All ER 1237 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Telnikoff v. Matusevitch [1992] 2 AC 343 HL ***(refd)***
Turner (Otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd [1950] 1 HL 449 ***(refd)***

Legislation referred to:

Defamation Act 1957, ss. 8, 9
Rules of the High Court 1980, O. 78 r. 3(2)

Other source(s) referred to:

A Criticism of Art Critics, pp 168 - 217
Clerk and Lindsell on Torts, 12th end, para 1586
Gatley on Libel and Slander, 8th edn, p 509
Gatley on Libel and Slander, 6th edn, pp 4, 14, 55, paras 4, 31
Mc Gregor on Damages, 15th edn, 1988, pp 254-255
Mc Gregor on Damages, 17th edn, pp 178-179
Mehrotra's Commentary on Law of Defamation Damages & Malicious Prosecution (Civil & Criminal), 5th edn, 2004, p 372

For the plaintiff - Lee Khai (Shien Shyong Tham with him); M/s Ong & Manecksha
For the defendant - M Puruvalan (KC Tang with him); M/s KC Tang & Co

Reported by Ashok Kumar

A

JUDGMENT

Chew Soo Ho JC:

[1] The plaintiff is a Consultant Psychiatrist at Hospital Lam Wah Ee, Penang with more than 30 years standing in that field and is currently still a member of the Board of Trustee in the Mental Health Association of Penang. He has been the past-president of Penang Medical Practitioners' Society, past-chairman of Malaysian Medical Association, Penang and past-president of Rotary Club of Bayan Baru. He is also an art dealer, art writer, publisher and owned an art gallery since 1989 besides being the Honourable Consultant to Christies International Singapore Pte Ltd for Malaysia Art and a philanthropist, *inter alia*. Defendant meanwhile is an artist and a writer.

[2] The plaintiff's action for libel emanated from two articles written by the defendant which appeared in the Sunday Sun dated 7 April 2002 titled "A Review of A Comprehensive History of Malaysian Art" (hereinafter referred to as 'the article in Sunday Sun') and in an art magazine named Art Corridor with the title "Views & Muse - Issue 8" (hereinafter referred to as 'the article in the art magazine'). The alleged impugned statement in the article in Sunday Sun is contained in the last sentence as follows:

> Spare us from more publications from financially self-interested art gallery middlemen like Dr Tan.

[3] The plaintiff alleged that this statement defamed him in that the plaintiff was self-centred, an opportunist and only interested in money.

[4] The alleged offending statements in the article in the art magazine are:

(i) "Tan also wrote that he invariably lost money on every publication. The reason for the financial failure can mean that the art readers here are more discerning and are not easily deceived into parting with their money on his printings."

(ii) "We do know that Tan's income from his business is impressive. Last year in the guise of donating 93 paintings worth RM480,000 to the Penang State Gallery, he was getting away from paying a certain amount of tax money

(RM437,300) as tax exemption from his profits. Tan's profits must be at least three times that amount and the final figures of the turnover of his dealings is anyone's guess". A

(iii) "For all we know, the artists and their works are varied in quality and some works just may not come up to the basic state collection standards and that Tan had fixed the prices as he wished. The game is to buy cheap and then sell expensive." B

(iv) "But I will not put any of my money on Tan's many charitable declarations and intents in the name of art. They all seemed to me too formulated to fit neatly in his plans to dominate the art market in a normal profit driven commercial way. He cloaks his profit driven motives, in the veil of charity to unsuspecting funds such as to the TH Koid Foundation and many other funds (even using his wife's name who had pass on a while back)." and C D

(v) "In the end, Tan is just interested to keep his art investments growing and do not want writers like me to throw light on his business practices for fear of losing buyers and potential collectors". E

[5] The plaintiff alleged that all the statements indicated that the plaintiff was unethical, had motive to enrich himself or to make profit, hid his motive behind the veil of charity, was unscrupulous in using his late wife's name to scoop profit, *inter alia*. F

[6] Defendant's principal defence is fair comment and justification besides putting the plaintiff to strict proof of the alleged libel.

The Issues G

[7] The issues as agreed by both parties are:

(a) Whether the alleged impugned words as recapitulated above from the two articles had the meaning and elements of defamation or libel against the plaintiff; H

(b) Whether the plaintiff had proved that the defendant had caused the publication of the said articles which allegedly contained the defamatory words; I

(c) Whether the offending words in the said articles were fair comment and/or whether there was justification;

(d) Whether plaintiff had suffered damages and whether he is entitled to general damages, aggravated and/or exemplary damages.

Evaluation & Findings

1st Issue: Whether The Alleged Impugned Words As Recapitulated Above From The 2 Articles Had The Meaning And Elements Of Defamation Or Libel Against The Plaintiff

[8] A fundamental essential which the plaintiff must prove in this suit is that the words as contained in the aforesaid two articles, the extracts of which are recapitulated and listed out above, must be defamatory which of course, must refer to the plaintiff. There is no doubt that in both the articles, the plaintiff's name was referred to and there is no denial by the defendant that his articles referred to the plaintiff. In *Sim v. Stretch* [1936] 2 All ER 1237, Lord Atkin had observed at p. 1240 that:

> The question then is whether the words in their ordinary signification are capable of being defamatory.

and laid down the test to be:

> Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

[9] In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56, His Lordship Mohamed Azmi J (as he then was), after having referred to *Gatley on Libel and Slander*, 6th Edition at p. 4 para 4 and p. 14 para 31 on the definition of defamation and defamatory imputation, formulated the tests at p. 58 as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty ... .

[10] It is well settled that whether the words are capable of a defamatory meaning is a question of law which the judge must decide: per Lord Atkin in *Sim v. Stretch (supra)*. In construing the ordinary and natural meaning of the words, the court may draw inference suggested by *innuendo* which reasonable persons would draw. By *innuendos*, it refers to whether it is an insinuation or an inference could be drawn from the words used; see *Mark Ignatius Uttley v. Wong Kam Hor & Anor* [2002] 8 CLJ 628 as submitted by learned counsel for the plaintiff.

[11] The plaintiff had complained of six statements stated by the defendant to be defamatory ie, one in the article in the Sunday Sun and five in the said art magazine. On the article in the Sunday Sun where the defendant expressed that "spare us from more publications from financially self-interested art gallery middleman like Dr Tan", the plaintiff submitted that by the natural and ordinary meaning of the words, the defendant had indicated that the plaintiff was self-centred, an opportunist and only interested in money. By construing the pertinent offending words of "financially self-interested art gallery middleman like Dr Tan" in their natural and ordinary meaning, I must agree with the plaintiff's contention in submission that the statement quoted indicates that the plaintiff as an art gallery middleman, was self-centred and interested in money only; hence the public must be spared from having more publications from the plaintiff. By saying so, the defendant had undermined the plaintiff as an art writer, art publisher and an art dealer, tending to lower the plaintiff in the estimation of right thinking members of society or to excite against the plaintiff, the adverse opinion of others that whatever publications from the plaintiff are financially orientated. I find these words in the context of the article in Sunday Sun (bundle B p. 1) to be libellous to the plaintiff. Pertaining to the five statements listed out as (i) to (v) above, that the defendant had written in the article, in the art magazine (bundle B pp. 5 - 6) which I reiterate them hereunder according to their same order of statement (i) to (v), the plaintiff submitted that in relation to the words complained of, in their natural and ordinary meaning, the words in statement (i) particularly that "the art readers here are more discerning and are not easily deceived into parting with their money on his (plaintiff's) printings indicated that the plaintiff was

a deceiver and/or a cheat. In *Concise Oxford English Dictionary*, Thumb Index Tenth Edition, "deceive" is given the meaning "deliberately mislead or misrepresent the truth to" or "(of a thing) give a mistaken impression". Reading the natural and ordinary meaning of the word "deceived" into the aforesaid words written by the defendant, it connotes to the public that the plaintiff's printings had the tendency to deliberately mislead or misrepresent the truth to the art readers so much so that they would not or should not expand their money on the plaintiff's publications. I am inclined to hold the view in the absence of any evidence to the contrary that these words are defamatory to the plaintiff.

[12] The statement (ii) written by the defendant alleged that the plaintiff "... in the guise of donating 93 paintings worth RM480,000 to the Penang State Gallery, he was getting away from paying a certain amount of tax money (RM437,300) as tax exemption from his profits ..." These words by their ordinary meaning, connote that the plaintiff's donation of the paintings to the Penang State Art Gallery was not sincere but was motivated to benefit the plaintiff himself as he was getting away with the sum of RM437,300 as tax exemption. Defendant was however unable to account for the fact, least to mention the truth of his allegation. In fact, he admitted in cross-examination that he did not even understand the differences between income tax and taxable income. Plaintiff stated in cross-examination that he had made many donations to various organisations and it was only once that he had applied for tax exemption ie, on this occasion for which he was attacked by the defendant. Plaintiff's witness (PW1) who is the director of the Penang State Museum Board and the curator of the Penang State Art Gallery had testified that in addition to the 93 paintings, plaintiff (Dr Tan) had donated a number of other paintings throughout the years, all without tax exemption and he was also instrumental in procuring donation of paintings from individual artists or their family; she even gave their names. (P1 Q & A5). This evidence was not refuted by the defendant. To tell or write a probable untruth or facts which the defendant knew or had reason to believe to be untrue or reckless as to its truth or was unable to verify its veracity, can only be construed to have been done with bad intent which is to tell the general public or the readers that the plaintiffs' donation is not

what it seems to be but motivated for his self interest of getting tax exemption. Reading the natural and ordinary meaning of the words, I am of the view that the ordinary man will doubt the sincerity of the plaintiff in donating his paintings and will perceive that the plaintiff's intent to donate was solely for the purpose of his own benefit of obtaining tax exemption for his profits. As stated by Lord Reid in *Rubber Improvement Ltd v. Daily Telegraph Ltd (also cited as Lewis v. Daily Telegraph Ltd)* [1964] AC 234 at p. 258:

> The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience or worldly affairs .... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the Plaintiff has been called a thief or a murderer. But more often, the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.

[13] The above passage from Lord Reid was quoted by Thean J in *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 at p. 705 and in *Mark Ignatius Uttley (supra)* at p. 637. I am of the view that the words tend to lower the plaintiff in the estimation of right-thinking ordinary man of the society generally. Consequently, I hold that this statement (ii) by the defendant in their natural and ordinary meaning is libellous to defame the plaintiff.

[14] Defendant's statement (iii) above deposes that the artists and their works are varied in quality and some works just may not come up to basic state collection standards and that Tan (the plaintiff) had fixed the prices as he wished; the game is to buy cheap and then sell expensive. Plaintiff submitted that by this statement, the defendant had indicated that the plaintiff was unethical, donating artworks of inferior quality, fixed the price of paintings as he wished and to his own advantage and that plaintiff is a profiteer. Defendant did not reply categorically on this submission by the plaintiff. I find that this statement (iii) is directly

linked to statement (ii) above in relation to the 93 paintings worth RM480,000 donated by the plaintiff to the Penang State Art Gallery as the wordings preceding this statement (iii) in the same paragraph of defendant's article in the art magazine (B - p. 5 last para), states: "We would like to know who are these artists, what quality and conditions are their artworks; did the Penang Art Gallery exercise their curatorial powers on any of the pictures and who decided on the prices of the collection?" Following these words, defendant alleged that some of the artist's works may not come up to the basic state collection standards and that the plaintiff had fixed the prices as he wished as the game is to buy cheap and then sell expensive. By alleging that the plaintiff was the one who fixed the prices of the paintings and practising the game to buy cheap and then to sell expensive, defendant has indeed cast a repercussion on the plaintiff of being unethical in the pricing of the paintings that he had donated to the Penang State Art Gallery in the sense that the paintings may not be of the standard but the selling prices were hiked up though they were bought cheap as it was the plaintiff who had fixed the prices as he wished. By the natural and ordinary meaning of the words, I find that these words are of defamatory nature as it tends to draw an adverse opinion of others against the plaintiff. According to PW1, the curator of the Penang State Art Gallery, out of the 51 artists from the 93 paintings donated by the plaintiff, 37 of them are the artists whose work the State Art Gallery, should have in its permanent collection. This evidence which the defendant did not challenge would have affirmed the quality of the artists and their work which the Penang State Art Gallery cherished to be in their permanent collection. Hence the defendant's allegation of random price fixing and buying cheap and selling expensive is probably untrue. Defendant in fact admitted that he had no basis to allege so as he did not conduct any research nor any investigation into the matter. I find that the plaintiff had proved this statement (iii) to be libellous.

[15] Moving on to statement (iv) written by the defendant which referred to the plaintiff's charitable declarations and intents in the name of art, defendant expressed that, to him, they all seemed too formulated to fit neatly in the plaintiff's plans to dominate the art market in a normal profit driven commercial way. Plaintiff was said to have cloaked his profit driven motives in the veil of charity to

unsuspecting funds such as to the TH Koid Foundation and many other funds (even using his wife's name who had pass on a while back). Plaintiff explained in his witness statement P2 Q & A37 that he donated 100 paintings in 2002 to the TH Koid Foundation for setting up of the Mrs Tan Sian Bian Haematology Fund in memory of his late wife Tan Sian Bian who passed away in November 2001 on acute myeloid leukemia. The estimate value of the paintings was about RM400,000. The paintings were to be exhibited and sold with the proceeds to be channelled to the fund. Since his wife succumbed to that disease, he set up the fund in aid of those who suffer from the same disease. It was thus submitted for the plaintiff that the defendant's allegation herein had indicated that the plaintiff was unethical, had motive to enrich himself and hid such motive behind the veil of charity and was unscrupulous in using his late wife's name to scoop profit. I find, reading the natural and ordinary meaning of the words in the defendant's allegation which he was unable to substantiate and hence without basis, that they were defamatory and were calculated to attack plaintiff on the charitable work that the plaintiff had done by asserting that such act was to dominate the art market for own profit and the plaintiff's profit driven motive was cloaked in the veil of charity. Defendant even finds it objectionable for one to use his deceased wife's name or his deceased parent's name in charity which I find to be absurd and deplorable.

[16] The last statement (v) repugnant to the plaintiff alleged that the plaintiff is just interested to keep his art investment growing and do not want writers like the defendant to throw light on his business practices for fear of losing buyers and potential collectors. Plaintiff submitted that the defendant's words had indicated that the plaintiff was carrying on an unethical business to make profit and thus had reason to fear that his unethical business will be exposed and that will cause him to lose money. Reading statement (v) in its entirely, I am of the view that the words which expressed that the plaintiff who was interested to keep his art investments growing and who was afraid to lose buyers and potential collectors if his business practices were brought to light by writer like the defendant, by its natural and ordinary meaning, imputes that the plaintiff's business practices must be bad that if exposed, the plaintiff would lose buyers and potential collectors.

A This imputation that the plaintiff was practising bad business practices is defamatory to the plaintiff when the defendant did not come up with any true facts to substantiate his allegation of bad business practices of the plaintiff.

B **[17]** From all the aforesaid statements made by the defendant in the article in the Sunday Sun and in the art magazine illustrated and deliberated above for which the defendant merely denied them to be defamatory, I find on a balance of probabilities that the plaintiff had proved that the words in the various statements C recapitulated above and as pleaded by the plaintiff in totality, in their natural and ordinary meaning, connote defamation against the plaintiff in that the plaintiff is a liar and a cheat, untrustworthy, irresponsible; selfish and self-centred; an opportunist motivated by self profit; and was conducting bad business practices.

D *2nd Issue: Whether The Plaintiff Had Proved That The Defendant Had Caused The Publication*

[18] In *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233, His Lordship Wan Hamzah E SCJ in delivering the judgment of the Supreme Court said at p. 238:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By F publication, it is meant the making known of defamatory matter, after it has been written, to some person other than the person to whom it is written. The uttering of a libel to the party libelled is no publication for the purposes of a civil action: *Wennhak v. Morgan* …

G **[19]** From the evidence in this case, I am satisfied that the defendant had caused to be published his articles in the Sunday Sun and in the Art Corridor magazine which he admitted that he had written to the editors of both publishers with the expectation that they would be published and they were indeed accordingly H published. The Sun is a daily newspaper in the country and it is meant for public reading, so is the Art Corridor magazine which is available for all its readers. The publication in the respective tabloid and magazine which could be read by any general public, constitutes publication for the purpose of this defamation suit.

I

[20] The defence's only contention is that the plaintiff had set out the same article published in the Sunday Sun in his book titled *A Criticism of Art Critics* (B pp. 168 - 217) and published them. The plaintiff had openly replied the comment made by the defendant in the Sunday Sun. He also wrote in the Art Corridor magazine and repeated a summary of what he had replied and discussed in his book. Plaintiff had also invited the defendant to answer or reply to his correspondences so that they could discuss the matter further and fixed the problem at hand. It was upon the plaintiff's request that the defendant responded with the article in the art magazine (B p. 5-6) which formed the basis of this suit besides the article in the Sunday Sun. Plaintiff explained that he had no opportunity to rebut the defendant's allegation in the Sunday Sun as the Sun was closed down at that material time. Since he was publishing his book, he used the opportunity to rebut what the defendant had published. He averred that he repeated the defamatory words in his book and his article in the art magazine so that the public would know how and why he was defamed. Even when he had invited the defendant to respond, he did so in a gentle way and he had not used any defamatory words in his articles. In bundle B p. 8, plaintiff maintained that he did state that the defendant's articles contained words which were defamatory to him. I find the plaintiff's explanation to be reasonable. In order to facilitate his reply and rebuttal of the defendant's defamatory words or allegations, it is only reasonable for the plaintiff to quote the relevant words or allegations to show what he was referring to and what he was replying or trying to rebut. I am of the view that when a defendant had published words which are defamatory against the plaintiff, the fact that the plaintiff had subsequently republished the quoted defamatory words to enable him to explain, reply or rebut the said defamation, does not absolve the initial publication by the defendant on account of the subsequent quotation for that stated purpose. Although in this case, the plaintiff had invited defendant to respond to his article in the art magazine, he did so in a cordial manner so that they could discuss the matters further and fix the problem at hand. I find such invitation to solve the problem should not have angered the defendant in any way and there is absolutely no reason for the defendant to use defamatory words to attack or accuse or condemn the plaintiff. Though the defendant was invited to respond or reply to the plaintiff's

correspondences, it did not confer on the defendant the right to defame the plaintiff. I do not find defendant's contention on this issue to be tenable.

3rd Issue: Whether The Offending Words By The Defendant Were Fair Comment And/Or Whether There Was Justification

[21] Fair comment and justification are the defences pleaded by the defendant. Section 9 of the Defamation Act 1957 (Act 286) provides:

> Fair comment
>
> 9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[22] The learned counsel for the defendant had cited numerous English authorities on this issue of fair comment: *Carr v. Hood* [1808] 1 Camp. 354; *Kemsley v. Foot* [1952] AC 345 HL; *Telnikoff v. Matusevitch* [1992] 2 AC 343 HL; *Turner (Otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 HL 449; *Campbell v. Spottiswoode* [1863] 3 B & S 769; *Macleod, MD v. Wakley* [1828] 3 Car & P 311. The cases of *Carr v. Hood and Kemsley v. Foot* relate to the publication of a book, play etc which might subject to the judgment of the public, thereby inviting comment and that anyone could thus comment upon the performance. However Lord Ellenborough had made it clear in *Carr v. Hood* when he said at p. 985 that:

> ... I speak of fair and candid criticism; and this, everyone has a right to publish, although the author may suffer a loss from it... Nothing can be conceived more threatening to the liberty of the press than the species of action before the Court. We ought to resist an attempt against free and liberal criticism at the threshold.

[23] In *Kemsley v. Foot*, Lord Porter expressed at p. 359 that:

> In the next place, in order to give room for the plea of fair comment, **the facts must be truly stated. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails** ... (emphasis added)

[24] Lord Tucker added at p. 362 that:

> ... where the facts relied on to justify the comment are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment, **but that he must establish sufficient facts to support the comment to the satisfaction of the jury**. (emphasis added)

[25] In *Telnikoff v. Matusevitch (supra)*, Lord Templeman took the approach on the question of fair comment at p. 355 as follows:

> If the contents of the letter were fair comment, then the plaintiff cannot complain notwithstanding that they were defamatory. If the contents of the letter included defamatory statement of facts, however, then the plaintiff will succeed in his action for defamation unless the statements of fact set out in the letter were true ...

[26] The law is clear that whatever comment or criticism, it must be towards the work or the performance of the author and it must be fair and candid. Any publication of defamatory statement of facts, however, must be true; otherwise, it would be a defamation. The other authorities basically also revolve around the same basis. As stated by Lord Tenterden CJ in Macleod, *MD v. Wakley (supra)*:

> It had been stated on the part of the defendant, that the matter contained in the publication relates to the plaintiff only as an author; but still there is no doubt that a man who is an author, has a right to have his character protected, just the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticizing the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel.

[27] Certainly, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document: per Brett LJ in *Capital And Counties Bank v. Henty* [1882] 7 App Cas 741. Whether pursuant to s. 9 of the Defamation Act 1957 or the common law, to constitute fair comment, a distinction must first be drawn between an expression of opinion which if given fairly or constructively, comes within the ambit of fair comment and an

assertion of facts which the defendant must prove or establish sufficiently to substantiate his comment basing on them to render it to be fair comment. For that matter, O. 78 r. 3(2) of the Rules of the High Court 1980 (RHC) requires the defendant to plead clearly the expression of opinion as distinct from the statement of facts that he relies on and they must be particularized; it reads:

> Where in action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or plead to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

[28] In para. 11 of the statement of defence (bundle A p. 22), defendant had pleaded "fair comment upon a matter of public interest" and stated therein "The plaintiff will particularize the facts and the facts and matters on which the comments are made after the orders for discovery and further and better particulars are made in these proceedings". To say that "The plaintiff will particularize the facts and matters on which the comments are made" does not seem to make sense as there is no such requirement for the plaintiff; what is required of the plaintiff is *vide* his pleadings to particularize the defamatory statements made by the defendant. The onus is on the defendant pleading fair comment to particularize or show which are the words in the impugned statements of the defendant are comments and which are facts. Most probably, it is an error to state "The plaintiff instead of "The defendant". Nevertheless, up to the commencement of the trial till the end of it, no such particularization had been tendered to court by the defendant nor any amendment sought to include the requisite particulars. Paragraph 12 in the statement of defence (bundle A p. 23) gave the particulars of facts as "... the defendant had written those words complained of by the plaintiff in his capacity as an art critic". These particulars of facts do not comply with the requirement of O. 78 r. 3(2) RHC above as the defendant had failed to show what are the words in the libellous statements that are comment and those that are facts. In *Clerk and Lindsell on Torts* (12th end) para. 1586, the learned author said:

> If there is any defamatory sting in facts stated in the alleged defamatory matter they remain actionable unless they are justified. In a clear analysis of the defence of fair comment after the Defamation Act 1952, s. 5 and s. 6, the New Zealand Court of Appeal in *Truth (NZ Ltd v. Avery)*, has accepted the view stated in the last sentence, and has considered the relationship of justification and fair comment where both are pleaded. The Court held: (a) that fair comment is a defence to comment only and not only to defamatory statements of fact, and that s. 6 had not altered the law in this request; (b) that where there is any defamatory sting in any of the facts on which the comment is based that these defamatory statements of fact can only be defended by a successful plea of justification which now the benefit of s. 5 of the Defamation Act, 1952.

[29] In short, fair comment is not available as a defence to statements of facts which are defamatory; the available defence is justification. Fair comment is applicable to comment only ie, an expression of opinion. I am of the view that the proposition of law above is consistent with the requirements under O. 78 r. 3(2) RHC which the defendant must draw a distinction between expression of opinion for which he can claim fair comment and statements of fact for which his comments are based and for which he must prove. Fair comment must be confined to expressions of opinion but not on assertions of facts unless the defendant is able to prove those facts to be true. An illustration can be found in the case of *Merivale v. Carson* [1887] 20 QBD 275 which involved a published criticism of a play that made reference to one of the characters being "a naughty wife" though in fact there was no adulterous wife in play. Bowen LJ said at p. 284:

> Still there is another class of cases which, as it seems to me, the writer would be travelling out of the region of fair criticism - I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

[30] I find that the failure of the defendant to plead the requisite particulars for which he must do so pursuant to O. 78 r. 3(2) is a clear breach which will render the defence of fair comment unsustainable and failed as the parties as well, as the court will not know which statement is an expression of opinion and which is a statement of facts Be that as it may, from an assiduous examination of the impugned statements contained in the articles published in the Sunday Sun and in the Art Corridor magazine, I find that the expressions describing the plaintiff as "financially self-interested art gallery middleman", that "in the guise of donating 93 paintings ... he was getting away from paying a certain amount of tax money (RM437,300) as tax exemption from his profits.", that "Tan had fixed the prices as he wished. The game is to buy cheap and then sell expensive", that "... He cloaks his profit driven motives, in the veil of charity to unsuspecting funds ..." and that "Tan ... do not want writers like me to throw light on his business practices for fear of losing buyers and potential collectors", are statements of facts which had the tendency to cast adverse imputation on the character and reputation of the plaintiff beyond an expression of opinion and for which defendant could not substantiate or prove. It is undoubted that an author of an article written or a book published and others could be commented or criticized even vehemently but it must be observed that it should be confined to his work and it does not extend to his character and/or reputation unless it is based on facts which is true. There is no necessity that the defamatory imputation must have actual effect on a person's character or reputation; it suffices when there is such a tendency to affect them. From the available evidence before this court, I am unable to find that the defendant's allegation of comment was based on any true facts nor that what he had expressed in the aforesaid two publications were fair and not malicious. Reading all the statements published, I am inclined to hold the view that under the pretext of criticising the plaintiff, the defendant took the opportunity of attacking the character and reputation of the plaintiff that whatever plaintiff did was cloaked under profit driven motives *inter alia*; and that is to this court not fair comment but libellous; see *Macled MD v. Wackley (supra)*, per Lord Tenterden CJ.

[31] On justification, s. 8 of the Defamation Act 1957 provides that: A

> Justification
>
> 8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injured the plaintiff's reputation having regard to the truth of the remaining charges. B

[32] In *S Pakianathan v. Jenni Ibrahim (supra)*, the Federal Court had imposed the burden on the defendant to establish justification by proving that the defamatory imputation is true. At pp. 177 - 178, His Lordship Wan Hamzah SCJ said: C

> The burden lies upon the defendant to establish justification. The burden does not lie on the plaintiff to prove that the defamatory words are false, because the law presumes this in his favour: *Belt v. Lawes*. To establish justification, the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true: *Peters v. Brad* laugh ... D E

[33] See *Ismail Shamsudin v. Abdul Aziz Abdan And Other Suits* [2007] 8 CLJ 65. On an evaluation of the evidence of the defendant in its entirety, I must say that there is absolutely no evidence from the defence to prove that the defamatory imputation is true. There is also no submission on this point. His evidence shows that he did not attempt to find out, investigate or verify whether what he had imputed on the plaintiff libellously were true. For example, on the allegation of tax exemption, defendant admitted that he did not know the difference between income tax and taxable income and said that the figure of RM437,300 that he alleged the plaintiff was getting away with tax exemption was his guess. A guess work cannot be a true fact. Defendant alleged that the plaintiff fixed the prices of the paintings donated to the Penang State Art Gallery but he did not find out nor did he know of any price mechanism. On the next breath, he agreed that there was a price fixing mechanism and that it was not the plaintiff who valued the prices of the art. These are examples of clear evidence from the defendant himself of telling F G H I

untruth in his assertions of facts against the plaintiff. On the overall evidence of the defence, I am unable to find that the defendant had satisfied his burden to prove his assertions of the facts which are defamatory as described herein above to be true. On the contrary, his evidence consisted of admissions of conjectures and untruths as illustrated above apart from his failure to prove the other defamatory imputations to be true. If the facts upon which the defendant asserted the defamatory imputation against the plaintiff are not true or do not exist, the plea of justification must fail. In the circumstances, I hold that the defendant had failed to prove the defence of justification.

[34] Upon the failure of the defendant to establish the plea of fair comment and to prove the defence of justification, the defendant's defence collapsed and defendant is liable to the plaintiff for libel.

4th Issue: Damages

[35] In assessing damages which are presumed, the court is entitled to take into consideration, the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, the evidence led in aggravation or mitigation of the damages; see *Gatley on Libel and Slander* at p. 509 para. 1380 similarly at 8th edn, para 1451 as cited in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor (supra)* at 60. Plaintiff submitted the case of *Carson v. John Fairfax & Sons Ltd* [1993] 178 CLR 44 where the High Court of Australia had expounded the three purposes to be served by damages awarded for defamation as follows:

> ... The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant.

[36] In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912 CA, His Lordship Gopal Sri Ram JCA (as he then was), after examining the law on nominal damages awarded for defamation in several authorities, remarked as follows at p. 930:

> I must record my strong disapproval of any judicial policy that is directed at awarding very low damages for defamation. That is not to say that low or even nominal damages may not be awarded in particular cases, for examples, where a plaintiff is without any or any worthwhile reputation. But I do hold the view that injury to his reputation may occasion him at least as much, if not greater, harm than injury to his or her physical self. No one, least of all a journalist, should rest in the comfort that a person's reputation may be injured with impunity on the footing that the consequence would be the payment of a few thousand ringgit in damages. Small or insignificant awards by Courts in libel actions will certainly provide that comfort. As I indicated to Counsel in the course of argument, the time has arrived for the Court to send a strong and clear signal to all and sundry that libel does not come cheap.

[37] The aforesaid remarks by His Lordship serve as a warning to the public at large that "libel does not come cheap" and a reminder to the courts to impose an award to reflect, perhaps, the deterrence towards such tortious act. From the plaintiff's evidence, he merely stated that the defendant's articles were a shocking indictment of his character, professionalism and reputation especially in the art world. He added that considering his professional standing and his active involvement in the medical and art world and his activities in public life, his reputation once tarnished will lose its luster. Nevertheless, I do not find any evidence led in aggravation or any evidence of financial loss by the plaintiff apart from what is stated above. Defendant, on other hand, urged this court to consider the fact that the plaintiff only complained the first alleged defamatory statement by the defendant when the plaintiff's solicitors issued a letter of demand more than a year after the publication and that the plaintiff had himself republished or repeated the alleged defamatory statements in his book and in the Art Corridor Magazine for which he had also replied to them extensively. However, the defendant did not elaborate in what way this fact would or could have affected the damages to be awarded. I find the act of the plaintiff in replying to the defamatory statements or imputations published by the defendant to be a reasonable remedial action to correct the probable adverse perception or estimation of the right thinking public towards him which he must be entitled to do. The damage

had been done by the defendant; he did not mitigate his wrongful act and no apology was published or extended to the plaintiff. I find no cause for the defendant to complain of the plaintiff's right to reply to the defamatory statements and the untruth therein published by the defendant.

[38] Plaintiff had submitted that the damages should be awarded in the sum of RM400,000 as general damages and RM200,000 as aggravated and exemplary damages. In *Mehrotra's Commentary on Law of Defamation Damages & Malicious Prosecution (Civil & Criminal)* 5th edn. 2004 p. 372, the learned author said of exemplary damages as follows:

> It is now settled after the decision of the House Lords in *Rookes v. Barnard* and the decision of the Court of Appeal in *Mc Carey v. Associated Newspapers Ltd*, that, at common law, damages for defamation are purely compensatory. There is no room hereafter for importing the concept of exemplary or punitive damages, except in two well-defined categories of cases. The first category is of those cases, where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government. The second category is comprised of those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff. Except in these two types of cases, there is no departure from the ordinary compensatory principle for all torts, including libel.

[39] For aggravated damages, the learned author had referred to *Mc Carey v. Associated Newspapers Ltd* [1964] 3 All ER 947 CA and said:

> Therefore, aggravated damages, may be awarded within the compensatory principles; in circumstances, specifically referred to above, *viz* if there has been any kind of high-handed oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering, which is caused by defamation and which may constitute injury to the plaintiff's pride and self-confidence ...
>
> What then are the injuries, for which the plaintiff should be compensated?
>
> This is explained by Lord Justice Diplock in that same case at page 959 (as) follows:

> In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains, may be classified under two heads: (i) the consequences of the attitude adopted to towards him by other persons, as a result of the diminution of the esteem, in which they hold him, because of the defamatory statement; and (ii) the grief for annoyance caused by the defamatory statement, to the plaintiff himself. It is the damages under this second head that may be aggravated by the manner in which, or the motives with which, the statement was made, or persisted in. There may also be cases, where Lord Devlin's second principle is applicable; as, for example, if any newspaper of a film company has, in the view of the damage-awarding tribunal, deliberately published a defamatory statement in the expectation of increasing its circulation and profits by an amount, which would exceed damages, awarded by way of compensation alone ...

[40] The above passages are explicit as to the current position of aggravated and/or exemplary damages in defamation cases in particular. For the award of aggravated damages, there has to be an evidence of any kind of high-handed oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and which may constitute injury to the plaintiffs' pride and self-confidence. In brief, as Diplock LJ put it "the grief for annoyance caused by the defamatory statement to the plaintiff himself. To qualify for exemplary or punitive damages, apart from cases where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government" and "the defendant's conduct ... calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff" (per Lord Devlin in *Rookes v. Barnard* [1964] AC 1129; see *Mc Gregor on Damages* 15th edn, 1988, pp. 254-255; 17th edn pp. 178-179). There is a third exception propounded by Lord Devlin in the same case ie, where there is express authorization by statute. Our Defamation Act 1957, however, does not provide such express authorization. On the facts and evidence in the instant case, I find that there is no clear evidence from the plaintiff to prove the criteria for aggravated and exemplary damages as envisaged by the law. My consideration will therefore be on the general damages as claimed by the plaintiff. Having considered all the relevant factors as mentioned above including the plaintiffs

position and standing in the society and in the fields where he is in as well as the failure of the defendant to mitigate the harm done to the plaintiff, I propose to award the sum of RM150,000 to the plaintiff which I find to be fair and reasonable to compensate him for the damages that he had suffered as well as to reflect that 'libel does not come cheap' in the circumstances of this case.

Conclusion

[41] Having considered the entire case and the submissions by both parties, I hold that the plaintiff had proved his case on a balance of probabilities and judgment is therefore entered in favour of the plaintiff in the sum of RM150,000 as general damages with interest at the rate of 8% per annum from the date of judgment to the date of realization and costs of RM10,000.